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ORDER OF DISTRICT JUDGE, DATED FEBRUARY 18, 1953

The above entitled action came on for hearing before this Court on the 9th day of February, 1953, on motion to dismiss for lack of jurisdiction, and the Court finds:

1. From the evidence in this case the land known as Barnwell Island and the subject of litigation in this case is attached to the real estate located in South Carolina and has been so attached for many years.

2. The land has been in the undisputed actual possession of the defendants in this case for over ten years.

3. The defendant, E. B. Pinckney has paid taxes on this property for the past ten years to taxing authorities of the State of South Carolina and has never paid any taxes to the taxing authorities of the State of Georgia.

4. From the evidence the interest of the plaintiff in this case is amply protected by the hearing of this suit in either South Carolina or Georgia for the Government has the right to condemn the property and the property owner will receive just compensation whether the case is tried in the South Carolina or the Georgia Courts, therefore this suit seems much ado about nothing.

It is ordered that this action be, and the same is hereby dismissed.

This the 18th day of February, 1953.

F. M. SCARLETT,
United States District Court.

ORDER AND JUDGMENT OF DISTRICT COURT DATED OCTOBER 28, 1953

The sole question involved in this proceeding is whether the principle of prescription and acquiescence is applicable in determining the boundary between States.

At the hearing of defendant's motion for dismissal of the Government's case on February 9, 1953, the Government introduced in evidence a copy of the Beaufort Convention of 1787 whereby all islands in the Savannah River were reserved to the State of Georgia. The Government likewise introduced certain maps which substantiated their contention.

It was admitted by both sides that Barnwell Island has been connected with other lands in South Carolina for many years. The Government contends however, it became connected by Acts of the Government relative to improving the harbor.

The Court could not understand why the Government was anxious to try this case in Georgia when it would inconvenience all the witnesses who reside near Barnwell Island by coming to Savannah to Court and the owner would receive just compensation for the taking whether the case was tried in South Carolina or Georgia until it received a brief in this case from the Savannah District Authority who stated they were a party of interest but not a party to the record, and it would appear from that brief that the City of Savannah desires to obtain this property for soilage operation in the harbor.

This Court, of course, is not concerned with any agreement between the United States of America and the City of Savannah but it is interested in seeing that the owner of the property is paid the market value for the same.

The Court is of the opinion that the State of Georgia did acquire title to this property at the Beaufort Convention but holds that the principle of prescription and acquiescence is applicable in determining the boundary between the States and from evidence submitted including the affidavit of the Sheriff of the County, where the land is located, which is attached to stipulation of Counsel in this case,

and which is hereto attached, which is uncontradicted, this property is in the State of South Carolina, and the Court where this land is located has jurisdiction to determine the market value of this property.

The Court is relying upon the decision *Arkansas v. Tennessee,* 310 U. S. Reports, page 563, which states:

> "1. Land on the Arkansas side of the Mississippi River was cut off by a sudden change of the river's course, in 1821 and became attached to the Tennessee side. Held:
>
> (1) That it subsequently became a part of Tennessee as the result of long and continuous exercise by that State of dominion and jurisdiction over it with acquiescence of Arkansas. P. 566.
>
> (2) That an addition to this area, caused by gradual accretion from the river, was also subject to the Tennessee jurisdiction. P. 572.
>
> 2. The principle of prescription and acquiescence is applicable in the determination of boundaries between States. P. 569.
>
> 3. The rule of the thalweg rests upon equitable consideration and it intended to safeguard to each State equality of access and right of navigation in the Stream. The rule yields to the doctrine that a boundary is unaltered by an avulsion; and in such case, in the absence of prescription, the boundary no longer follows the thalweg but remains at the original line. P. 571.
>
> 4. The doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long continued and uninterrupted assertion of dominion and jurisdiction over the area affected. P. 571.
>
> 5. The question whether a State has acquired political jurisdiction by prescription is not affected by the circumstances that the title to the area is in the United States, such title not being disputed.

Not deciding whether or not E. B. Pinckney, the claimant, is entitled to the market value of this property, the

Court did take in consideration the laws of South Carolina pertaining to prescription together with the affidavit of the Sheriff and E. B. Pinckney that E. B. Pinckney received a deed to this property in 1936.

Section 10-2421, Code of Laws of South Carolina, 1952, is as follows:

> "When possession presumed; when occupation deemed under legal title. In every action for the recovery of real property or the possession thereof the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law. The occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title unless it appear that such premises have been held and possessed adversely to such legal title for ten years before the commencement of such action."

Section 10-2422, Code of Laws of South Carolina, 1953, is as follows:

> "Occupation under written instrument, etc. Whenever it shall appear (1) that the occupant or those under whom he claims entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument as being a conveyance of the premises in question or upon the decree or judgment of a competent court and (2) that there has been a continued occupation and possession of the premises, or of some part of such premises, included in such instrument, decree or judgment under such claim for ten years, the premises so included shall be deemed to have been held adversely, except that when the premises so included consist of a tract divided into lots the possession of one lot shall not be deemed a possession of any other lot of the same tract."

Section 10-2423, Code of Laws of South Carolina, 1952, is as follows:

> "What constitutes adverse possession under written instrument etc. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:
>
> (1) When it has been usually cultivated or improved;
>
> (2) When it has been protected by a substantial enclosure;
>
> (3) When, although not enclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry or for the ordinary use of the occupant; and
>
> (4) When a known farm or a single lot has been partly improved the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

Section 10-2424, Code of Laws of South Carolina, 1952, is as follows:

> "Premises held adversely but not under written instrument. When it shall appear that there has been an actual continued occupation of premises under a claim of title, exclusive of any other right but not founded upon a written instrument or a judgment or decree, the premises so actually occupied, and not other, shall be deemed to have been held adversely".

Section 10-2425, Code of Laws of South Carolina, 1952, is as follows:

> "Adverse possession under claim of title not written. For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument or a judgment or decree, land shall be

deemed to have been possessed in the following cases only:

(1) When it has been protected by a substantial enclosure; and

(2) When it has been usually cultivated or improved."

The costs to be assessed in accordance with law provided in such cases as the case in the United States District Court for the Southern District of Georgia is hereby dismissed.

The United States of America, of course, is entitled to file its suit for condemnation in the proper Court in South Carolina.

This the 28th day of October, 1953.

(s) F. M. SCARLETT,
United States District Judge,
Southern District of Georgia.

ORDER OF DISTRICT JUDGE, DATED NOVEMBER 23, 1953

It appearing that the above proceeding was dismissed by Order of the Court, dated February 18, 1953, and the United States of America having filed a motion for a new trial and the Court having rendered an opinion and judgment thereon on the 28th day of October, 1953, now therefore

IT IS HEREBY ORDERED That the motion of the United States of America for a new trial be and the same is hereby denied.

Dated: the 23rd day of November, 1953.

(s) F. M. SCARLETT,
United States District Court,
Southern District of Georgia.

DECISION OF COURT OF APPEALS FOR FIFTH CIRCUIT REVERSING CASE

(Decided March 22, 1955)

Before HOLMES, BORAH, and RUSSELL, Circuit Judges.

BORAH, Circuit Judge: This is an appeal from an order of the District Court for the Southern District of Georgia dismissing a condemnation proceeding which had been brought by the United States to acquire a perpetual and assignable easement to enter upon, occupy, and use certain lands known as Barnwell Island for the deposit of spoil or other matters excavated in the construction, improvement and maintenance of Savannah Harbor.

The tract or parcel of land sought to be condemned was described as lying and being in Chatham County, Georgia. Among those listed in the complaint as having or claiming an interest in the property were E. B. Pinckney, the States of South Carolina and Georgia, the Sheriff of Beaufort County, South Carolina, the Forfeited Land Commission of that county and the Sheriff of Chatham County, Georgia. Of these named, Pinckney was the only one to enter an appearance and he moved to dismiss the complaint on the ground that the court lacked jurisdiction by reason of the fact that the land involved was located in the State of South Carolina.

At the hearing which was had on the motion to dismiss, it was admitted that Barnwell Island was originally an island in the Savannah River and that for many years it has been connected with the South Carolina shore. Pinckney, who claimed that he was the owner in fee simple of the property, testified that he had paid taxes thereon for the past ten years in Beaufort County, South Carolina and had never paid any taxes to the taxing authorities of the State of Georgia. The Government, in turn, introduced in

evidence a copy of the Beaufort Convention of 1787 whereby all islands in he Savannah River were reserved to the State of Georgia. In addition, the Government also introduced certain maps in evidence which substantiated their contention. When the evidence was closed the court concluded the hearing with an expression of its views [1] and thereafter and in keeping therewith it entered a formal order dismissing the Government's complaint.

Following the entry of the order of dismissal the Government moved for a new trial and the State of Georgia applied for leave to intervene as a party to the proceedings on the grounds (1) that title to the islands in the Savannah River was confirmed in the State of Georgia in 1789 by the terms of the Beaufort Convention, and (2) that the State had not since that time, granted, ceded, sold, nor otherwise disposed of said lands. The intervention was allowed and the motion for a new trial was set down for hearing. After several continuances and on the day when the motion was finally scheduled to be heard, and pursuant to suggestions made by the court, it was agreed by and between the United States and E. B. Pinckney that for the purpose of the motion for new trial and in lieu of presenting witnesses that the court should consider the stipulations agreed upon [2] as additional evidence on the question of jurisdiction. Thereafter the court rendered a judgment sustaining the order under review and subsequently it entered a formal order denying the motion for a new trial.

In its "judgment" which was in the form of an opinion the court below said:

---

[1] "The Court: Well, I think I have got it in my mind. I am going back to Georgia law where a man has been in possession of property for seven years under an adverse claim and stays in possession and cultivates it. I still don't see the necessity of this case. The government is going to take the property and pay for it, whether it is in Georgia or in South Carolina. I am going to decide with South Carolina. You can take your order."

[2] The State-intervenor was not a party to this agreement.

"The Court is of the opinion that the State of Georgia did acquire title to this property at the Beaufort Convention but holds that the principle of prescription and acquiescence is applicable in determining the boundary between the States and from evidence submitted including the affidavit of the Sheriff of the County, where the land is located, which is attached to stipulation of Counsel in this case, and which is hereto attached, which is uncontradicted, this property is in the State of South Carolina, and the Court where this land is located has jurisdiction to determine the market value of this property."

The trial court thus recognized that title to Barnwell Island was confirmed in the State of Georgia by the terms of the Beaufort Convention. But, on the authority of *Arkansas v. Tennessee,* 310 U. S. 563, it justified dismissal of the proceeding on the ground that the land in question should now be deemed to be within the boundaries of South Carolina by virtue of prescription and acquiescence on the part of Georgia in the exercise by South Carolina of dominion and jurisdiction over the described land.

In *Arkansas v. Tennessee, supra,* upon which the court below relied, the State of Arkansas brough suit against the State of Tennessee seeking a decree determining the true boundary between the States at certain points and confirming the jurisdiction and sovereignty of the State of Arkansas over the described property. Tennessee answered, contesting the claims of Arkanasas and the issues were referred to a Special Master. In his report the Master found that land which had been on the Arkansas side of the Mississippi River was cut off by a sudden change in the River's course in 1821, and had become attached to the Tennessee side. Rejecting Arkansas' claim to the land, the Supreme Court approved the Master's finding that Tennessee had continuously exercised dominion and jurisdiction over that area from the year 1826 to the time of the bringing of the

present suit and that the record showed the acquiescence of Arkansas and this assertion of dominion by Tennessee. Without undertaking to set out the facts in greater detail we deem it sufficient to say that this case is but one of many, such as *Indianna v. Kentucky*, 136 U. S. 479, 510, and *Louisiana v. Mississippi*, 202 U. S. 1, 53, in which the Supreme Court has applied the universally recognized principle of prescription and acquiescence in determining a disputed boundary between States. The combined effect of these decisions is that when a dispute as to the boundary line between two states arises, the principle of prescription and acquiescence is applicable, and when it appears that there has been long acquiescence in the possession of territory or the exercise of sovereignty, long continued acts which show recognition of a certain line as a boundary line may have controlling effect in the determination of that boundary. It is therefore clear that the principle is applicable in the case of a disputed boundary when, and only when, there is a sufficient basis of fact for its application. And this brings us to a consideration of the only identifiable evidence to which the trial judge referred, the affidavit of the Sheriff of Beaufort County.

The affidavit of the sheriff states that from the time of his induction into office in 1926, until the repeal of the Volstead Act he had gone upon the land in search of law violators and had destroyed numerous distilleries and that once in 1932 and again in 1946, he took from the City of Savannah with the assistance of its police, two persons who had committed crimes on Barnwell Island, and delivered them for trial in South Carolina where they were convicted and sentenced to the penitentiary. The affidavit of the sheriff further states that on October 6, 1935, he "went upon this land and seized same, taking exclusive possession in the name of the County of Beaufort and State of South

Carolina, upon a warranty of Execution for nonpayment of taxes assessed against same;" that to satisfy the execution the land was sold in February, 1936, to the FORFEITED LAND COMMISSION OF BEAUFORT COUNTY, SOUTH CAROLINA, and that on January 6, 1942, that Commission deeded the land to E. B. Pinckney. This statement in reference to a deed was the only evidence before the court other than Pinckney's own testimony that he had paid taxes on the land, that Pinckney has anything even purporting to be color of title to Barnwell Island. And the only comment of the trial judge in respect thereto was his statement that he "did take into consideration the laws of South Carolina pertaining to prescription together with the affidavit of the sheriff and E. B. Pinckney, that E. B. Pinckney received a deed to this property in 1936." As to this statement we point out that this record does not contain an affidavit of E. B. Pinckney and according to the sheriff's affidavit, Pinckney received the deed in 1942 and not in 1936.

In examining the record we are impressed by the circumstance that the evidence does not contain either the deed under which Pinckney asserts his title or the deed to the Forfeited Land Commission of South Carolina and in the absence of even the slightest attempt to explain their nonproduction it is certainly reasonable to indulge in the assumption that if either of them had lent support to Pinckney's claim to Barnwell Island that counsel would not have failed to introduce them in evidence. But be that as it may there is one thing that is certain and that is that there is no evidence in this record, including the sheriff's affidavit which is not specific as to description, that the Forfeited Land Commission of South Carolina ever attempted to give Pinckney or anyone else, title to any lands which now or formerly were islands in the Savannah River.

The utmost finding the evidence will support is, that claimant Pinckney and the sheriff think it did.

The boundary line between Georgia and South Carolina is not in dispute as between these sovereigns. Neither the State of South Carolina nor any official purporting to act for South Carolina has intervened, become a party, or made any appearance in this proceeding and even if Georgia could lose territory by acquiescence in an assertion of jurisdiction by South Carolina, this record contains nothing of substance to show either acquiescence or assertion. It is true that Georgia did not tax the land but there is nothing to show that this was because the State did not believe that the land was within its jurisdiction. When South Carolina sanctioned the compact it admitted in the most solemn form that the land in controversy was not within her jurisdiction and it is certainly reasonable to assume that Georgia believed it owned the land. Consequently, there was no occasion for it or any of its political subdivisions to impose a tax. On the other hand, South Carolina has not claimed jurisdiction over the land in controversy. It has not been shown that the taxes, for which the land was sold to the Forfeited Land Commission of Beaufort County, and by it to Pinckney, were imposed by the State or applied to the benefit of the State. Of little weight also are the acts of the sheriff and others on which appellee relies as showing that South Carolina asserted dominion and jurisdiction over the tract in question. There is no proof here that Georgia had knowledge of, much less that it acquiesced in, these isolated activities and it is absurd to say that a state has relinquished a right of which it is not aware. Furthermore, there is nothing here to connect the state of South Carolina with these transactions and she does not and cannot claim that she acquired any

right by virtue of these activities. Similar actions were so appraised in *Missouri v. Kentucky*, 11 Wall. 395, 402-403.

There is, there can be, no doubt that the land here involved is in the State of Georgia, Article 1 of the Beaufort Convention specifically reserved to Georgia all the islands in the Savannah River and the Supreme Court by its decision and decree in *Georgia v. South Carolina*, 257 U. S. 516, 259 U. S. 572, confirmed that reservation. It follows that the condemnation proceeding was properly brought in the court below, 28 U. S. C. Sec. 1403, and that it was erroneously dismissed for want of jurisdiction.

(Reversed and remanded.)

(Judge Russell participated in the hearing and decision of this cause, but died before the opinion was filed.)

PETITION FOR REHEARING

The petitioners pray that this Court grant a rehearing of its decision of March 22, 1955, reversing the Order of the District Court dismissing the proceedings, upon the following grounds:

1. The decision of this Court was obviously predicated upon its conclusion that there was no evidence "that the Forfeited Land Commission of South Carolina ever attempted to give Pinckney or anyone else, title to any lands which now or formerly were islands in the Savannah River". In reaching this conclusion it is respectfully submitted that this Court must have overlooked the intent and purpose of the stipulation entered into between the Government and Pinckney whereby it was solemnly agreed between them that, in lieu of presenting oral testimony and documentary evidence in open court, the contents of the affidavit of J. E. McTeer (R. 71) shall be considered as evidence. From such evidence it is clear that the land in question was sold by the State of South Carolina for the

nonpayment of taxes to the Forfeited Land Commission of Beaufort County, South Carolina, which in turn deeded the land to E. B. Pinckney.

2. The decision of this Court also appears to rest upon its conclusion that the "utmost finding the evidence will support is, that claimant Pinckney and the sheriff think" that the lands conveyed to Pinckney from the Forfeited Land Commission of South Carolina was the lands which now or formerly were islands in the Savannah River. In reaching this conclusion it is respectfully submitted that this Court must have overlooked that part of J. E. McTeer's affidavit (R. 71) in which he states that "he is familiar with a tract of land, formerly in the County of Beaufort, now in the County of Jasper since 1950 by Act of the South Carolina Legislature, commonly known as 'Barnwell Island' ". Moreover the Court must have overlooked that this land which is the subject matter of the action is known to J. E. McTeer and no question was raised in the court below as to the identity of the land in question.

3. The decision of this Court was also based upon its conclusion that there was not sufficient basis of fact for the application of the principle of prescription and acquiescence. In reaching this conclusion it is respectfully submitted that this Court must have overlooked the evidence of record showing (1) that the Sheriff of Beaufort County, which is a political sub-division of the State of South Carolina, exercised the duties of his office upon the tract in controversy by destroying numerous illegal distilleries on said tract of land (T. R. 71); (2) that the said tract of land was taken and seized by a political sub-division of the State of South Carolina upon a warrant of execution for nonpayment of taxes against said land (T. R. 72); (3) that the said land was thereafter sold to the Forfeited Land Commission of South Carolina (T. R. 72); (4) that officers

of the City of Savannah, Georgia, gave aid and assistance to South Carolina authorities in apprehending Georgia fugitives from justice who committed offenses upon the tract in question (T. R. 72, 81 and 82); (5) that Georgia authorities apprehended criminals in Georgia who were turned over to South Carolina authorities for prosecution of offenses committed on the land in question (T. R. 82); (6) that Beaufort County imposed taxes upon the land in question since 1875 (T. R. 82), and, Pinckney during the time he was in possession paid taxes on said land to the County of Beaufort, South Carolina (T. R. 23); (7) that it is a matter of notoriety and public record that the tract in question is South Carolina property (T. R. 83); (8) that no taxes were levied on the said tract in question by the State of Georgia or any of its political sub-divisions although said land was occupied and used for farming purposes; and (9) that the Government recognized the ownership of said tract of land by Pinckney and as being located in South Carolina by reason of the negotiation of a lease between it and Pinckney describing the lands as being located in South Carolina (T. R. 29).

4. The decision of this Court was also based upon its conclusion that *Arkansas v. Tennessee*, 310 U. S. 563, has no application here. In reaching this conclusion it is respectfully submitted that this Court overlooked that the Supreme Court held that evidence showing (1) the imposition of taxes on land by a particular State; (2) the maintenance by such particular State of records of assessments of taxes on said land; (3) a tax sale by officials of such particular State of said land; (4) the service of process on said land in the name of such particular State; and (5) the payment of taxes on said land to such particular State, constitutes sufficient evidence to prove exercise of dominion and jurisdiction by such State over said lands. And this

Court also must have overlooked that the Supreme Court held that the failure of a State to assert any claim to land over which another State exercises dominion and jurisdiction constitutes an acquiescence of the exercise of such dominion and jurisdiction over said land. The instant case is factually similar to *Arkansas v. Tennessee,* 310 U. S. 563, and the principle of prescription and acquiescence announced therein is thus controlling in the instant case.

For the reasons set forth above and in the brief filed by appellees it is respectfully urged that a rehearing be granted, and that upon such rehearing, the judgment of the District Court be affirmed.

Respectfully submitted,

HENRY H. EDENS,
CLYDE A. ELTZROTH,
RANDOLPH MURDAUGH,
Attorneys for Petitioners.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented and filed in good faith and not for delay.

HENRY H. EDENS,
CLYDE A. ELTZROTH,
RANDOLPH MURDAUGH.

ORDER DENYING REHEARING

Extract from the Minutes of April 19, 1955

UNITED STATES OF AMERICA,

No. 14990

versus

450 ACRES OF LAND, MORE OR LESS, KNOWN AS BARNWELL ISLAND, SITUATE IN CHATHAM COUNTY, GEORGIA and E. B. PINCKNEY, ET AL.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

(Judge Russell participated in the hearing and decision of this cause but died before the opinion was filed.)